

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: COMPLAINT OF CAROLYN FRAHM	DOCKET NO. FCU-2013-0007
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**ORDER REGARDING SECOND MOTION TO COMPEL (WINDSTREAM),
ALLOWING LATE-FILED RESISTANCE, AND REQUIRING FILING**

(Issued October 9, 2014)

Second Motion to Compel Discovery (Windstream)

On September 24, 2014, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a “Second Motion to Compel Discovery (Windstream)” (motion to compel) with the Utilities Board (Board). Board rule 199 IAC 7.15(5) provides that opposing parties shall be given the opportunity to respond within ten days of the filing of the motion. Windstream Communications Iowa, Inc. (Windstream), did not file a response to the Consumer Advocate’s motion to compel by the deadline of October 6, 2014. On October 8, 2014, Windstream filed a resistance to the motion. Although the resistance was filed late and did not request that the late filing be allowed, the resistance was filed just before this order was issued, includes additional relevant information regarding the motion, and it will therefore be considered.

In its motion, the Consumer Advocate requests an order compelling Windstream to produce the information requested in Data Request Nos. 64 and 65.

Data Request No. 64 seeks production of the summaries of findings and recommendations provided to the Federal Communications Commission (FCC) Compliance Officer, as referenced in Data Request No. 57. Data Request No. 65 seeks production of the notices Windstream has sent to intermediate providers that they have missed the goals or thresholds (as defined in Section 5 of the Operating Procedures included in the Compliance Manual), or not met Windstream's acceptable call quality standards (as stated at page 12 of the Compliance Plan). Data Requests 64 and 65 both allow Windstream to exclude information regarding intermediate providers that were not involved with transmission of telephone calls placed to or from Iowa. Although the data requests are a little unclear, it also appears the Consumer Advocate is only requesting information regarding intermediate carriers who were involved with telephone calls to or from Iowa after January 1, 2014. The Consumer Advocate states that Windstream asserted two objections to the data requests and did not produce any responsive documents.

The data requests with Windstream's responses to the Consumer Advocate are attached to the motion. In its responses, Windstream objected that the data requests were, in part, vague, ambiguous, and unintelligible because Windstream did not know how to determine whether intermediate providers might "potentially" be involved in the transmission of telephone calls, and Windstream stated it did not understand what was meant by "aggregated information including Iowa." Windstream also objected to the extent the data requests asked for information other

than information pertaining to Iowa intrastate calls. In response to Data Request No. 64, Windstream also responded that, without waiving its objections: “with respect to summaries of findings and recommendations to Windstream’s Compliance Officer, no such summaries of findings and recommendations pertain solely to Iowa intrastate calls.” In response to Data Request No. 65, Windstream also responded that, without waiving its objections: “it has not notified any intermediate provider that it has missed the goals or thresholds or not met Windstream’s acceptable call quality standards with respect to Iowa intrastate calls.”

The Consumer Advocate argues that Windstream’s vagueness objections are without merit, and argues that Windstream does not allege the first sentence of each data request is vague. The Consumer Advocate states the remaining sentences in each data request are its effort to separate information that would not be relevant to Iowa, if such a separation is possible. The Consumer Advocate argues the sentences are not vague, ambiguous, or unintelligible, and if Windstream cannot separate the Iowa-specific information in a way that provides the responsive information relevant to Iowa, it should produce all the responsive documents.

In addition, the Consumer Advocate argues Windstream’s objection to providing information other than that related to Iowa’s intrastate calls is also without merit. The Consumer Advocate argues the reason the FCC included intrastate calls in its rural call completion data reporting rules is that the same telecommunications network is used for both intrastate and interstate calls, and “collecting only a partial

picture of rural call completion rates could prevent [the FCC] from ensuring that intrastate calls are properly being completed.”¹ The Consumer Advocate argues that the same rationale applies to the issue when viewed from the state’s perspective. The Consumer Advocate argues that information concerning an intermediate provider’s performance with respect to calls to a rural telephone number in Iowa is therefore relevant regardless of whether the information concerns attempted calls that are intrastate, interstate, or aggregated intrastate and interstate. The Consumer Advocate argues the information is relevant both to assessing the reliability or unreliability of the network and to assessing the strength or weakness of the monitoring of the intermediate carriers.

The Consumer Advocate also argues the rules of discovery are broadly construed to effect the disclosure of relevant information. Finally, the Consumer Advocate argues the information requested is highly focused and should be neither voluminous nor difficult to locate.

In its resistance, Windstream argues the Consumer Advocate filed its motion apparently based on the mistaken impression that it does not have documents responsive to Data Request Nos. 64 and 65. Windstream argues it has fully responded to the data requests and has provided the Consumer Advocate with additional data demonstrating that it is fully complying with its agreement with the FCC, and is providing telecommunications service to its Iowa customers in full

¹ *In the Matter of Rural Call Completion*, 28 F.C.C.R. 16154 (November 8, 2013), ¶ 33.

compliance with Iowa Code § 476.3 and well above the standards set forth in the Compliance Manual.

With regard to Data Request No. 64, Windstream reiterated the arguments it made to the Consumer Advocate in its initial response to the data requests regarding vagueness and intrastate calls. Regardless of these arguments, and without waiving them, Windstream states it decided to provide the Consumer Advocate with the data provided to Windstream's Compliance Officer for both Iowa intrastate and Iowa interstate calls in an effort to bring the matter to a conclusion.

Windstream states this was not easy because the data provided to the FCC Compliance Officer was aggregated data compiled on a nationwide basis, and it was not possible to simply redact non-Iowa-specific data. Instead, Windstream states, its employees had to manually compile and enter the data into the format established in the Compliance Manual. Windstream provided the Consumer Advocate with 16 pages of responsive data for all 145 rural OCNs in Iowa from May to August 2014. Windstream states the information provided shows that its call completion rates for these rural OCNs were never below 97%, and most were at 100% for all four months. Windstream states the data shows it followed up with specific intermediate carriers for each rural OCN with less than 100% performance rating with respect to the metrics established in the Compliance Manual, and the data shows the reasons for calls not completing Windstream received from the intermediate providers. Windstream states these data sheets are the summaries of findings and

recommendations it provided to the FCC Compliance Officer that the Consumer Advocate requested, for both intrastate and interstate calls in Iowa.

Windstream states the Consumer Advocate has received the requested data. Windstream states a telephone call or email inquiry could have avoided the Consumer Advocate's motion and Windstream's resistance. Windstream states the data sheets establish solid performance in Iowa and Windstream's monitoring and addressing call quality metrics for intermediate providers in the state. Windstream argues that instead of focusing on understanding the data provided, the Consumer Advocate filed another motion to compel. Windstream argues more discovery is not helpful. Instead, it argues, the parties should focus on resolution of this matter, as the data sheets, along with Windstream's Compliance Manual, establish the company's diligence.

With regard to Data Request No. 65, Windstream repeated the arguments it made to the Consumer Advocate in its initial response to the data requests regarding vagueness and intrastate calls. Nonetheless, for the same reasons, Windstream states it provided data to the Consumer Advocate on September 22, 2014, that demonstrated no intermediate provider has missed the goals and thresholds prescribed in the Compliance Manual or not met Windstream's acceptable call quality standards with respect to Iowa intrastate and Iowa interstate calls. Windstream argues that if the Consumer Advocate had only inquired of Windstream, the motion to compel would not have been necessary.

In addition, Windstream states, it will provide the Consumer Advocate with a redacted email notice provided to an intermediate carrier regarding excessive trouble tickets. Windstream states the notice does not pertain to Iowa, but instead to the carrier's aggregate trouble tickets across Windstream's footprint. Windstream states this is the only such notice that it has provided to an intermediate carrier since May 2014. Windstream states that since receiving the notice, the carrier took corrective action, removed an underlying carrier, and changed the service. Windstream states that after the intermediate carrier's written response to Windstream, the number of trouble tickets for that intermediate carrier has improved.

Windstream offered to confer with the Consumer Advocate to explain the data that have been provided.

Therefore, Windstream requests that the Consumer Advocate's second motion to compel be denied.

Analysis

Discovery procedures applicable to civil actions are available to the parties in contested cases before the Board. Iowa Code § 17A.13 (2013); 199 IAC 7.15(1). "The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request." Iowa R. Civ. P. 1.501(2). "Parties may obtain discovery regarding any matter, not privileged, which

is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Iowa R. Civ. P. 1.503(1). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of relevant evidence. *Id.* "As this rule makes clear, a party is entitled to discover any information that is not privileged and that is relevant to the subject matter of the lawsuit. [citation omitted.] Relevancy to the subject matter of the lawsuit is broader than relevancy to the precise issues in the pleadings because the rule allows discovery of inadmissible information as long as it leads to the discovery of admissible evidence." *Mediacom Iowa, LLC, v. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004).

Considering these factors, the undersigned finds the arguments of the Consumer Advocate to be persuasive as to why the information requested is relevant and discoverable. The data requests are clear enough for Windstream to be able to understand what is being requested, and they set appropriate limits so that only information relevant to Iowa is included.

However, it appears that Windstream has already provided the information requested in Data Requests 64 and 65 to the Consumer Advocate, so no ruling on the motion to compel is needed. Windstream has offered to explain the information provided if requested by the Consumer Advocate. If the Consumer Advocate does

not understand the data provided, it must talk with Windstream as Windstream offered.

In its motion to compel, the Consumer Advocate states it has made a good faith effort to resolve the issues without the involvement of the undersigned administrative law judge. It appears from the filing that the parties have only had limited email contact regarding their dispute. The parties' filings show they have apparently not had any telephone contact to attempt to work out their differences or clarify matters regarding the discovery provided.

Before any further discovery motions or responses are filed, the parties must have had at least one telephone or face-to-face conversation in an attempt to resolve any discovery disputes or need for clarification of materials provided.

Request for Clarification of Ruling on Motion to Compel

On October 3, 2014, the Consumer Advocate filed a "Request for Clarification of Ruling on Motion to Compel" (request for clarification) with respect to Data Request No. 27. Apparently, Windstream provided substantial data to the Consumer Advocate in response to Data Request No. 27, but did not provide correspondence regarding the data. Although the Consumer Advocate states it has made a good faith effort to resolve the issues with respect to Data Request No. 27 without the involvement of the undersigned administrative law judge, the filing only provides a very limited email exchange in support of the statement. The filing does not indicate that the parties have had any telephone or face-to-face discussion in an attempt to

resolve this latest of their differences with regard to Data Request No. 27 or to provide clarification regarding the information the Consumer Advocate states it needs. Therefore, the parties are directed to do so. The Consumer Advocate must file a notice with the Board letting the undersigned know when the conversation has taken place, and whether the parties have been able to resolve their differences and if the Consumer Advocate has received the clarifications regarding the information provided that it needs.

At the end of the request for clarification, the Consumer Advocate states it “also requests a further clarification and amplification that Windstream may exclude specific data on destinations outside Iowa but may not exclude general correspondence containing general questions, responses, or follow-up information regarding the nation as a whole or regarding Windstream’s relationships with the intermediate carriers it uses to complete calls.” The undersigned does not understand what this sentence means or the context in which it is asked. In its discussion with Windstream, the Consumer Advocate must clarify what it is asking for with Windstream.

Windstream has not yet filed a response to the request for clarification. If the parties are unable to come to a resolution regarding Data Request No. 27, Windstream must file its response to the request for clarification within 10 days after the Consumer Advocate files its notice regarding the parties’ conversation. 199 IAC 7.15(5).

IT IS THEREFORE ORDERED:

1. As discussed in the body of this order, Windstream has provided the information requested in the “Second Motion to Compel Discovery (Windstream),” filed by the Consumer Advocate on September 24, 2014. Therefore, no ruling on the motion is necessary. If the Consumer Advocate does not understand the information provided, it must discuss the information with Windstream.

2. As discussed in the body of this order, the Consumer Advocate and Windstream must discuss the Consumer Advocate’s “Request for Clarification of Ruling on Motion to Compel,” and the Consumer Advocate must file notice regarding the conversation with the Board.

3. As discussed in the body of this order, if the parties are unable to come to a resolution regarding Data Request No. 27, Windstream must file its response to the request for clarification within 10 days after the Consumer Advocate files its notice regarding the parties’ conversation. 199 IAC 7.15(5).

4. Before any further discovery motions or responses are filed, the parties must have had at least one telephone or face-to-face conversation in an attempt to resolve any discovery disputes or need for clarification of materials provided.

This will be the minimum for a showing that the parties have made a good-faith effort to resolve the discovery issue pursuant to 199 IAC 7.15(5).

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST

/s/ Joan Conrad
Executive Secretary

Dated at Des Moines, Iowa, this 9th day of October 2014.